

## THE ALIEN LAND LAWS: A REAPPRAISAL

The return of Japanese evacuees from wartime relocation centers to the West Coast<sup>1</sup> has brought the alien land laws of the Pacific Coast states<sup>2</sup> once more before the courts. The states, inspired by war strengthened anti-Japanese sentiment, have undertaken a revitalized campaign to enforce the prohibitions against the holding of agricultural land by aliens ineligible for citizenship—which, in effect, means the Japanese.<sup>3</sup> On the other hand, the opposition to legislative discrimination moves with a tread increasingly confident. The federal courts have shown a mounting reluctance to swallow prejudice preserved in precedent.<sup>4</sup> Moreover, the United Nations charter, which promises universal respect for human rights and freedoms regardless of race, sex, language, or religion,<sup>5</sup> suggests new lines of attack on anti-minority legislation hitherto deemed constitutional.

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1. For an excellent and exhaustive treatment of the wartime relocation of Japanese-Americans, see the series of publications by the War Relocation Authority, published in 1946 under the following titles: ADMINISTRATIVE HIGHLIGHTS OF THE WRA PROGRAM; COMMUNITY GOVERNMENT IN WAR RELOCATION CENTERS; THE EVACUATED PEOPLE: A QUANTITATIVE DESCRIPTION; IMPOUNDED PEOPLE: JAPANESE AMERICANS IN THE RELOCATION CENTERS; LEGAL AND CONSTITUTIONAL PHASES OF THE WRA PROGRAM: THE RELOCATION PROGRAM; TOKEN SHIPMENT: THE STORY OF AMERICA'S WAR REFUGEE SHELTER; WARTIME EXILE: THE EXCLUSION OF THE JAPANESE-AMERICANS FROM THE WEST COAST; THE WARTIME HANDLING OF EVACUEE PROPERTY. See also Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L. J. 489 (1945); Alexandre and Freeman, *War-time Control of Japanese-Americans*, 28 CORN. L. Q. 385 (1943). On the return of the evacuees see WAR RELOCATION AUTHORITY, SEMI-ANNUAL REPORT: JULY 1 TO DEC. 31, 1945 (1946); WAR RELOCATION AUTHORITY, TOKEN SHIPMENT: THE STORY OF AMERICA'S WAR REFUGEE SHELTER, 75-104 (1946); Lane, *Japanese Resettlement*, 4 PUB. WELFARE 127 (1946); Myer, *WRA Says Thirty*, 112 NEW REPUBLIC 867 (June 25, 1945); Neuberger, *Their Brother's Keeper*, 29 SAT. REV. OF LIT. No. 32; 4 (Aug. 10, 1946).

During the period of evacuation the Farm Security first took over Japanese farms, but later relinquished control to the War Relocation Authority. See, generally, WAR RELOCATION AUTHORITY, THE WARTIME HANDLING OF EVACUEE PROPERTY, 47-69 (1946), and Comment, 51 YALE L. J. 1316, 1327 (1942).

2. CAL. GEN. LAWS, Acts 260, 261 (Deering 1944; Supp. 1945); ORE. COMP. LAWS ANN. §§ 61-101-12, 201-4 (1940; Supp. 1945); WASH. REV. STAT. § 10581-92 (Remington 1932; Supp. 1940). See generally, Miller, *Alien Land Laws*, 8 GEO. WASH. L. REV. 1 (1939); GIBSON, ALIENS AND THE LAW 45-85 (1940); KONVITZ, THE ALIEN AND ASIATIC IN AMERICAN LAW, 157-70 (1946).

3. The phrase, "ineligible for citizenship," initially operated to exclude all Asiatics, since all "white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere" are eligible for citizenship. 54 STAT. 1140 (1940), 8 U.S.C.A. § 703 (1942). But in 1943 and 1946 Chinese and East Indians were granted eligibility, so the prohibition for all practical purposes, now applies solely to Japanese. See notes 92-3 *infra*.

4. See e.g., *Ex parte Kawato*, 317 U.S. 69, 73 (1942); *Smith v. Texas*, 311 U.S. 123, 130 (1940); *Mendez v. Westminster School Dist.*, 64 F. Supp. 544, 549 (S.D. Cal. 1946); *Ex parte Mohriez*, 54 F. Supp. 941, 943 (D. Mass. 1944).

5. See notes 134-6 *infra*.

The first of the West Coast alien land laws was enacted in 1913, and the constitutionality was established during the following decade.<sup>6</sup> Nevertheless, for a number of years prior to World War II, enforcement was only half-hearted. Legal loopholes, administrative inactivity, and public indifference enabled Japanese aliens to circumvent many of the prohibitions. At the same time—perhaps—prejudice was dwindling on the Coast.

However, the federal program for relocation of the Japanese in 1942 provided an unparalleled opportunity for the state governments to conduct investigations and adopt plans for systematic discrimination, under color of law, against the Japanese-born upon their return.<sup>7</sup> Moreover, the ease with which federal authorities had succumbed to old wives' tales about Black Dragon societies, Emperor worship, and sabotage cults endowed anti-Nipponism with an intellectual acceptability which it had not possessed during the more reasoning thirties.

Accordingly, the California and Oregon legislatures both amended their existing laws during the war years so as to provide for more strict control of Japanese land ownership,<sup>8</sup> and in 1945 the Attorney General of California was given an appropriation to expedite investigation by the counties of alien land law evasion.<sup>9</sup> Upon ascertainment, the state, in conjunction with the county, was to institute escheat proceedings, after which the land was to be sold, and the proceeds divided between state and county.<sup>10</sup>

Such proceedings received judicial sanction by the Supreme Court of California in *People v. Oyama*.<sup>11</sup> Before the war defendant, a Japanese alien, had farmed land held in the name of his minor citizen-son. Shortly after defendant's return from the wartime relocation center, California officials commenced an escheat action based on evidence gathered during his enforced absence. The California court upheld the state's contention that

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6. *Terrace v. Thompson*, 263 U.S. 197 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Frick v. Webb*, 263 U.S. 326 (1923).

7. Activity among the California District Attorneys was particularly fervid. See *Pacific Citizen*, March 11, 1944, p. 1, col. 4; April 15, 1944, p. 2, col. 2; April 22, 1944, p. 2, col. 1; June 3, 1944, p. 2, col. 5. Proposals for an initiative measure prohibiting Japanese-American citizens from owning land was also launched by the Native Sons of the Golden West, a notorious nativist organization. *Pacific Citizen*, March 18, 1944, p. 2, col. 4; April 29, 1944, p. 3, col. 3. Arkansas, in 1943, passed such a measure. *Pope Supp.* 1944 p. 618; *Laws*, 1943, Act 47, p. 74. A similar proposal was rejected by the Colorado Senate. *Pacific Citizen*, Feb. 12, 1944, p. 1, col. 5.

Japanese in America were the subject of detailed scrutiny by the California "little Dies" committee, of which Senator Jack B. Tenney was chairman. See Report of the Joint Fact-finding Committee on Un-American Activities in California to California Legislature, SEN. DAILY JOURNAL, April 9, 1943, 1464-94; April 16, 1945, 1441-62; June 14, 1945, 3856-76.

8. CAL. STATS. 1943, cc. 1003, 1059; 1945, cc. 1129, 1136; Ore. Sess. Laws (1945) c. 436. For discussion of these enactments see pp. 1024-5 *infra*.

9. CAL. STATS., 1945, c. 1458.

10. BUS. WEEK 50-1 (Aug. 4, 1945).

11. 173 P. 2d 794 (Cal. 1946); *cert. granted*, 15 U.S.L. Week 3376 (April 7, 1947).

placement of title in his son's name was mere subterfuge and a violation of the provisions of the land law.<sup>12</sup> Accordingly, the court decreed escheat.

The possibility of similar action pursuant to alien land legislation in Oregon and Washington has sufficient *in terrorem* effect to cause apprehension among the returning Japanese.<sup>13</sup> It is probable that instances comparable to that of the *Oyama* case will arise in those two states also, and that the Supreme Court of the United States will have abundant opportunity to reconsider the constitutionality of the alien land laws.<sup>14</sup>

#### BACKGROUND OF THE ALIEN LAND LAWS

*Alien Ownership of Land at Common Law and Conventional Statutory Modifications.* At common law an alien could acquire land by purchase—sale, inter vivos transfer, or devise—and hold it against all but the sovereign, who could divest it from him by the procedure of "office found."<sup>15</sup> Historical basis for this disability lay in apprehension for the "security of the realm," which was thought to be endangered by the amount of Norman-owned land during the thirteenth century.<sup>16</sup> An alien, however, could not take by operation of law—descent, dower, or curtesy—on the theory that the law would not do a futile thing by giving with one hand only to take away with the other. Thus, if an alien died intestate, his land escheated since he was said to have no "inheritable" blood.<sup>17</sup>

All American jurisdictions have modified the common law by constitution or statute.<sup>18</sup> The state laws vary in detail but fall generally into well-defined classifications: some treat all aliens alike; others distinguish between resident and non-resident aliens, between alien friends and alien enemies, between

12. 173 P.2d at 803.

13. At the present time a group of Japanese American citizens contemplate bringing a declaratory judgment action to challenge the Oregon alien land laws. Communication from Allan Hart, Esq., member of the Oregon bar, Dec. 20, 1946.

14. Certiorari was granted in *The Oyama* case; *Oyama v. California*, 15 U.S.L. WEEK 3376 (April 17, 1947).

15. *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (U.S. 1813); *Baker v. Shy*, 9 Heiskell 85, 89-90 (Tenn. 1871). See 5 TIFFANY, REAL PROPERTY § 1377 (Jones ed. 1939).

16. 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 92-3 (1926).

17. 5 TIFFANY *loc. cit. supra* note 15.

18. See generally on state statutes 5 VERNIER, AMERICAN FAMILY LAWS §§ 288-9, 291-2 (1938); GIBSON, *op. cit. supra* note 2, at 46-8, Table 4, Appendix B; MEARS, RESIDENT ORIENTALS ON THE AMERICAN PACIFIC COAST 163-5 (1927). For discussion of particular state legislation see Pratt, *Present Alienage Disabilities under New York State Law in Real Property*, 12 BROOKLYN L. REV. 1 (1942); Orfield, *Alien Land Rights in Nebraska*, 17 NEBR. L. BULL. 3 (1938); Ward, *The Mississippi Alien Statute*, 11 MISS. L. J. 313 (1939); Comment, *Right of an Alien to Own Land in Texas*, 7 TEX. L. REV. 607 (1929). Utah, formerly the only state preserving the common law as to alien land ownership, could not resist the trend during World War II: it enacted an Alien Property Law almost identical with the California law, prohibiting ownership of real property to aliens ineligible for citizenship. Utah Laws, 1943, Ch. 6a; UTAH CODE ANN., § 78-6a

aliens eligible and ineligible for citizenship, between those who have declared their intention to become citizens and those who have not.<sup>19</sup> In all cases the favored classifications are normally under no disability, whereas the right of disfavored groups to own land is either narrowly circumscribed or flatly denied.

Power to grant, prohibit, limit, and regulate rights of alien land ownership is traditionally considered an attribute of state "sovereignty," lurking within the interstices of the Tenth Amendment. In the absence of a treaty or Act of Congress operating within a constitutionally delegated "federal field," this power of the states has never been questioned by the courts.<sup>20</sup>

*Alien Land Laws on the Pacific Coast: the Preliminaries.* The Pacific Coast states' employment of alien land legislation as a vehicle for racial discrimination stems from the influx of Japanese to the West Coast following the Chinese Exclusion Act of 1882<sup>21</sup> and the legalization of Japanese labor emigration by the Emperor in 1890.<sup>22</sup> The number of immigrants was sufficiently great to cause alarm among West Coast "whites."<sup>23</sup> Although constitutional and legislative discriminatory measures were proposed in the 1890's, they received serious consideration only after 1900, the year of greatest Japanese immigration.<sup>24</sup> Presidential intervention in California prevented enactment of alien land laws in 1909 and 1911,<sup>25</sup> but by 1913 opinion was strong enough to secure passage despite intercession by Secretary of State Bryan.<sup>26</sup> The 1913 Act has been termed our first official act of discrimination against the Japanese.<sup>27</sup>

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(Supp. 1945). However this section has recently been repealed. See N.Y. Times, April 20, 1947, § 4, p. 6-E, col. 5. One of the most far-reaching modifications is WISC. CONST., Art. I, § 15 ("No distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property.")

19. See 5 VERNIER, *op. cit. supra* note 18, at 305-9.

20. See notes 70-1 *infra*.

21. 22 STAT. 59 (1882), 8 U.S.C.A. § 263 (1942).

22. The demand for cheap labor formerly satisfied by Chinese was now fulfilled by immigrant Japanese. H.R. REP. No. 2124, 77th Cong., 2nd Sess. 59-64 (1942) (hereinafter referred to as TOLAN REPORT); Buell, *The Development of the Anti-Japanese Agitation in the United States: I*, 37 POL. SCI. Q. 605 (1922).

23. TOLAN REPORT 72.

24. *Ibid.*

25. The 1909 session of the California legislature was rife with anti-Japanese bills. At President Theodore Roosevelt's suggestion the alien land bill was amended to include all aliens. TOLAN REPORT 76. It has been suggested that this change, objectionable to British landholding interests, was responsible for the defeat of the bill. *Id.* at 77; McWILLIAMS, PREJUDICE, JAPANESE AMERICANS: SYMBOL OF RACIAL INTOLERANCE, 45 (1944) (hereinafter cited as McWILLIAMS, PREJUDICE). Presidential intervention again helped defeat an alien land bill in 1911. TOLAN REPORT 77.

26. *Ibid.* See McWILLIAMS, PREJUDICE 45; KONVITZ, *op. cit. supra* note 2, at 158-60; Buell, *The Development of Anti-Japanese Agitation in the United States: II*, 38 POL. SCI. Q. 57, 60-5 (1923).

27. McWILLIAMS, PREJUDICE 45.

Anti-Japanese sentiment, dormant during World War I, acquired fresh vitality shortly afterwards<sup>28</sup> and inspired a new California law, adopted by Initiative,<sup>29</sup> which became the archetype for land acts passed thereafter by other western states.<sup>30</sup> The Act provided that all aliens eligible for citizenship under federal law might "acquire, possess, enjoy, transmit and inherit real property, or any interest therein" in the same manner as citizens.<sup>31</sup> Other (*i.e.* ineligible) aliens<sup>32</sup> and corporations with a majority of ineligible alien stockholders<sup>33</sup> might be accorded identical rights only if so guaranteed by treaty.<sup>33a</sup> Nor could an ineligible alien become guardian for a minor-citizen's estate in land.<sup>34</sup>

Property acquired in violation of the Act, or by colorable transfers with intent to evade the law,<sup>35</sup> was subjected to escheat in proceedings brought by the Attorney General or county attorney.<sup>36</sup> In such proceedings, a *prima facie* presumption of intent to evade was to arise upon proof of payment of consideration by the alien, registration of title in the name of an alien-controlled corporation, or execution of a mortgage in favor of an ineligible alien who subsequently took possession, control, or management.<sup>37</sup> However, property obtained by enforcement of a lien or mortgage or in good faith to secure a debt was exempted from the Act's prohibitions, but the land was to be disposed of within two years.<sup>38</sup> Conspiracy to effect a transfer violative of the Act was made criminally punishable.<sup>39</sup> Systematic enforcement of the Act was delayed until its constitutionality had been determined three years later by the United States Supreme Court.<sup>40</sup>

28. TOLAN REPORT 81-2; Buell, *supra* note 26, at 65.

29. Alien Property Initiative Act of 1920 Cal. Stats. 1921, p. lxxxiii. See generally on events surrounding passage of this act, TOLAN REPORT 84-6, McWILLIAMS, PREJUDICE, 57-66; PAJUS, THE REAL JAPANESE CALIFORNIA 91-100 (1937). For the two contemporary opposing points of view compare CALIFORNIA STATE BOARD OF CONTROL, CALIFORNIA AND THE ORIENTAL (1920) with AMERICAN COMMITTEE OF JUSTICE, CALIFORNIA AND THE JAPANESE; ARGUMENTS AGAINST THE ALIEN LAND LAW (1920).

30. TOLAN REPORT 86; KONVITZ, *op. cit. supra* note 2, at 161.

31. CAL. GEN. LAWS (Deering 1944) Act 261, § 1.

32. *Id.* § 2.

33. *Id.* § 3.

33a. This proviso, in conjunction with the Japanese-American treaty of 1911, in effect meant that Japanese aliens were precluded only from holding agricultural land. See note 128, *infra*, and related text.

34. *Id.* § 4. This section was intended to foreclose an obvious loophole in the law, since each Japanese alien with an American born child had at hand a potential landowner whose estate would need guardianship.

35. *Id.* § 9.

36. *Id.* § 7.

37. *Id.* § 9.

38. *Id.* § 7.

39. *Id.* § 10.

40. In *Terrace v. Thompson*, 263 U.S. 197 (1923). See McWILLIAMS, PREJUDICE 64. There had been considerable doubt expressed whether the laws were constitutional and the

The Oregon Alien Land Law, adopted in 1923,<sup>41</sup> followed the California Act of 1920 almost verbatim and the Washington law,<sup>42</sup> though differing in form and couched in somewhat more positive language, had basically the same effect. The only notable provisions missing from the Washington act were those relating to conspiracy and to the presumption of intent to evade.

*The First Court Tests.* Constitutional validation of west coast alien land legislation came in 1923 when the Supreme Court upheld the Washington law in *Terrace v. Thompson*.<sup>43</sup> In this case the citizen-owner of agricultural land sought an injunction to restrain enforcement of the alien land law against himself and his ineligible alien lessee. In affirming dismissal of the bill the Court, through Mr. Justice Butler, restated the proposition that, in the absence of a treaty, a state has power to deny all aliens the right to own land and is free also to make classifications based on declaration of intention to become citizens.<sup>44</sup> The fact that the lessee was of a race ineligible for citizenship under federal law was held not of itself enough to render such a classification arbitrary, unreasonable, or a denial of equal protection, since a state might well assume that Congress had acted reasonably in setting up classifications for naturalization.<sup>45</sup> The court felt also that the Washington act did not contravene any portion of the 1911 treaty with Japan since reciprocal right to ownership of agricultural land was specifically omitted from the treaty.<sup>46</sup>

The California law was held constitutional on the same day in the companion case of *Porterfield v. Webb*<sup>47</sup> on the basis of the *Terrace* decision. Two cases decided a few days later also involved the California law. In *Frick v. Webb*<sup>48</sup> the court upheld Section 3 of the Initiative Act which prohibited ineligible aliens from owning stock in a landholding corporation, and in *Webb v. O'Brien*<sup>49</sup> the court determined that a "cropping contract" gave an alien

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decision of the Supreme Court upholding them was surprising to many. See *Ibid.*; and see Collins, *Will the California Alien Land Law Stand the Test of the Fourteenth Amendment?* 23 YALE L. J. 330 (1914).

41. Ore. Laws, 1923, ch. 98, §§ 1-10, ORE. COMP. LAWS ANN. §§ 61-101-11 (1940).

42. Wash. Laws, 1921, Ch. 50, §§ 1-11, WASH. REV. STAT. §§ 10581-92 (Remington 1932). The Washington land law is framed to prohibit only those who have not in good faith declared their intention of becoming a citizen. Since alien Japanese, ineligible to become citizens, may not file declarations of intention, the law has the same ultimate effect.

43. 263 U.S. 197 (1923).

44. *Id.* at 219.

45. The real basis of Mr. Justice Butler's opinion lay, submittedly, in the legalistic trick of assuming his conclusion. He wrote: "The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself." *Id.* at 221. No showing had been made nor proof elicited that the quality and allegiance of the Japanese alien farmer was either inferior to or different from that of the native "white." See Cohen, Book Review, 56 YALE L. J. 910, 911 (1947).

46. 263 U.S. 197, 222 (1923).

47. 263 U.S. 225 (1923).

48. 263 U.S. 326 (1923).

49. 263 U.S. 313 (1923).

such an interest in the land as to be violative of the Act, although previously the California supreme court had ruled to the contrary.<sup>50</sup>

*Developments 1923-1941.* The California legislatures, in the first few years after the Supreme Court's capitulation to legalized discrimination, amended the Act so as to broaden the scope of the prohibitions: to the disability of ineligible aliens to acquire, possess, enjoy, transmit, and inherit land was added to "use, cultivate, occupy, and transfer," and to have "in whole or in part, the beneficial use of real property."<sup>51</sup> Cropping contracts were specifically included as an "interest" in land.<sup>52</sup> Difficulty experienced by the state in proving alienage was obviated by a 1927 procedural statute declaring that in any action under the alien land laws the burden of proving citizenship or eligibility, after proof of "interest in the land" and mere allegation of ineligibility, shifted to the defendant.<sup>53</sup> An amendment provided also that proof of membership in an ineligible race along with proof of an "interest" in land, created a prima facie presumption of ineligibility after which the burden devolved on the defendant to prove citizenship or eligibility.<sup>54</sup> The guardianship section of the 1920 Act had been declared unconstitutional by the California supreme court,<sup>55</sup> and in its stead was substituted a section permitting a citizen child of an ineligible alien to name his father as guardian, but imposing rigid limitations on the guardian's conduct.<sup>56</sup>

After *Terrace v. Thompson* and its consorts, the constitutionality of the alien land laws was apparently deemed unassailable;<sup>57</sup> litigation during the ensuing years dealt only with collateral sections and ancillary issues not clearly controlled by the Supreme Court decisions. A guardianship statute similar to that invalidated by the California court was held constitutional in Washington,<sup>58</sup> although Washington courts have generally been more reluctant than those of California to find intent to evade the land laws in the absence of clear and convincing proof.<sup>59</sup> The California presumption statutes have gen-

50. *Ex parte Okahara*, 191 Cal. 353, 216 Pac. 614 (1923).

51. Cal. Stats., 1923, c. 441, pp. 1020-1.

52. *Id.* at p. 1023. "Cropping Contracts" conventionally allow the alien possession as an independent contractor with complete control of cultivation, harvesting, handling and delivering the crop, enjoying unlimited discretion as to hours and wages in return for a percentage (usually one-half) of the net proceeds of sale. See *Dudley v. Lowell*, 201 Cal. 376, 377-8, 257 Pac. 57, 58 (1927).

53. Cal. Stats. 1927, ch. 528, p. 881, CAL. GEN. LAWS Act 261, § 9a (Deering 1944).

54. *Ibid.* CAL. GEN. LAWS Act 261, § 9b (Deering, 1944).

55. *Estate of Yano*, 188 Cal. 645, 206 Pac. 995 (1922).

56. Cal. Stats., 1923, c. 441, p. 1021, CAL. GEN. LAWS Act 261, § 4 (Deering 1944).

57. For analysis and criticism of the Supreme Court decisions see Powell, *Alien Land Cases in the United States Supreme Court* 12 CALIF. L. REV. 259 (1924).

58. *In re Fujimoto's Guardianship*, 130 Wash. 188, 226 Pac. 505 (1924).

59. See *State v. Kosai*, 133 Wash. 442, 451-2, 234 Pac. 5, 9 (1925) (land allegedly held in trust for alien, court said fraud is never presumed); *State v. Kurita*, 136 Wash. 426, 430, 240 Pac. 554, 555 (1925) (question of a dummy corporation; no direct evidence, though inferences were strong); *State v. Natsuhara*, 136 Wash. 437, 444, 240 Pac. 557, 560 (1925) (law not meant to apply to leases for "reasonable" length of time); *State v.*

erally been upheld,<sup>60</sup> but, as applied to a criminal land holding case, the prima facie presumption of alienage on proof of membership in an ineligible race was declared a denial of due process.<sup>61</sup> Ownership of non-agricultural land, on the other hand, has been universally held not to contravene the act.<sup>62</sup>

Despite the explicit language of the statutes and the judicial imprimatur of constitutionality, agricultural land continued to be held by and for ineligible aliens during the years between the adoption of the California Initiative Act and the outbreak of the war with Japan. Difficulties of investigation, public apathy and the ingenuity of clever counsel combined to render the alien land laws ineffectual, if not a dead letter.<sup>63</sup> The courts themselves on occasion winked at devices clearly designed to avoid the stringency of the laws.<sup>64</sup>

*Recent enforcement legislation.* In California enabling amendments were passed in 1943 giving the Attorney General declaratory and injunctive remedies in actions under the Act and giving public documents prima facie effect on questions of eligibility for citizenship.<sup>65</sup> A significant substantive amendment was also added, prohibiting any person from entering into an agreement to transfer an interest in land (including leases and cropping contracts) to a wife or child of an ineligible alien or to any one planning to hold land for an ineligible alien if the person entering into the agreement knew the ineligible alien was to be permitted to "go upon the land," farm, cultivate, or enjoy the beneficial use thereof. If such an agreement is made, and subsequently, the ineligible alien does in fact "go upon the land," the person entering into the agreement is guilty of a violation of the act and subject to punishment.<sup>66</sup>

In 1945 Oregon also enacted this provision<sup>67</sup> and passed, in addition, three

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McGonigle, 144 Wash. 252, 260, 253 Pac. 655, 656-7 (1927) (defendant took title allegedly for use of alien; plaintiff's information insufficient and defective).

60. *People v. Osaki*, 209 Cal. 169, 286 Pac. 1025 (1930), 3 So. CALIF. L. REV. 423, 44 HARV. L. REV. 121.

61. *Morrison v. California*, 291 U.S. 82, 94 (1934).

62. *Jordan v. Tashiro*, 278 U.S. 123 (1928), 2 So. CALIF. L. REV. 298 (Japanese Hospital); *Gonzalez v. Ito*, 12 Cal. App. 2d, 124, 55 P. 2d 262 (1936) (garage building and lot); *Palermo v. Stockton Theatres*, 76 Adv. Cal. App. 442, 172 P. 2d 103 (1946) (motion picture theatre). All these decisions opined that the issue was concluded by the provision in the 1911 Treaty with Japan which granted reciprocal rights to nationals to engage in "trade or commerce." 37 STAT. 1504.

63. See, generally, as to their ineffectiveness TOLAN REPORT, 78, 86; STRONG, THE SECOND GENERATION JAPANESE PROBLEM 211-2 (1934); KONVITZ, *op. cit. supra* note 2, at 167; McWILLIAMS, PREJUDICE, 65; Note 6 WASH. L. REV. 127 (1931).

64. *People v. Fujita*, 215 Cal. 166, 8 P. 2d 1011 (1932) (payment of purchase price and subsequent moving on land held not to violate land laws); *Takiguchi v. Arizona*, 47 Ariz. 302, 55 P. 2d 802 (1936) (Injunction not proper remedy to enforce compliance). See 6 WASH. L. REV. 127 (1931).

65. Cal. Stats. 1943, ch. 1059, §§ 4-6, 8, CAL. GEN. LAWS Act 261 §§ 10b-c, 12a (Deering, 1944). Public documents include certified copies of records, files, and documents of any public body, authority department, bureau, and agency, or entries, records, and files made by a public officer or employee in performance of his duty. *Ibid.*

66. Cal. Stats. 1943, ch. 1059, § 7, CAL. GEN. LAWS Act 261, § 11a (Deering, 1944).

67. Ore. Laws, 1945, ch. 436, § 5; ORE. COMP. LAWS ANN. § 61-201, (Supp. 1944-5).



procedural statutes:<sup>68</sup> a presumption of ineligibility statute similar to the 1927 California section; a provision wherein proof by the state that the alien was not a registered voter in the county wherein the land was located created a prima facie presumption that he was ineligible for citizenship; and a statute declaring that an ineligible alien who tills, farms, or works any land shall be presumed<sup>69</sup> to be the owner of a leasehold or some interest in that land. Of the west coast states Washington alone failed to tighten its alien land laws during the war.

The recent exhumation and renewed enforcement of the west coast alien land laws represent a recrudescence of prejudice hardly to be condoned. Notwithstanding *Terrace v. Thompson*, it is believed that direct constitutional attack is not foreclosed. A different judicial climate of opinion and changed circumstances on the coast may render the legislation offensive both to the Fourteenth Amendment and to the exclusive power of Congress over the "federal fields."

#### STATE CONTROL AND THE FOURTEENTH AMENDMENT

Conventional doctrine accords the state complete power to regulate ownership, descent, and use of land within its borders, except where limited by the federal constitution.<sup>70</sup> Accordingly, state exercise of the sovereign power to prohibit *all* aliens from owning land has been generally affirmed.<sup>71</sup> The Fourteenth Amendment however imposes limitations on the unbridled power of the state over persons and property. The due process and equal protection clauses unlike the privileges and immunities clause, are available to "persons," as well as citizens and include aliens—eligible, ineligible, and (possibly) enemy.<sup>72</sup> To protect the individual's liberty and property from arbitrary and discriminatory class legislation has been considered the functional justification for these two clauses.<sup>73</sup> Accordingly, judicial attacks on the Pacific Coast alien land laws might well proceed under the aegis of the Fourteenth Amendment.

*Classification and the Equal Protection Clause.* Most manifest today would seem the conflict of the alien land laws with the equal protection clause. "Equal protection," concededly, does not bar the possibility of classification.<sup>74</sup>

68. Ore. Laws, 1945, ch. 436, §§ 2-4, ORE. COMP. LAWS ANN. §§ 61-202-4 (Supp. 1944-5).

69. Nothing in the language of the statute indicates whether this presumption shall be conclusive or rebuttable. To regard it as conclusive would seem clearly a denial of procedural due process, and even to give it only prima facie effect would seem to transcend the bounds of reasonableness. See discussion p. 1032 *infra*.

70. *United States v. Fox*, 94 U.S. 315, 320-1 (1876).

71. *Toop v. Ulysses Land Co.*, 237 U.S. 580, 582-3 (1915). See *Mager v. Grimm* 8 How. 490, 493 (U.S. 1850); *Hauenstein v. Lynham*, 100 U.S. 483, (1879); *FREUND, POLICE POWER* § 706 (1904); 72 U. OF PA. L. REV. 148, 151 (1924).

72. 16 STAT. 140 (1870), 8 U.S.C.A. § 41 (1942); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

73. *FREUND, POLICE POWER* § 134 (1904).

74. *Id.* at §§ 610, 682, 721-5.

A state, upon ascertaining an evil which is within its power to correct, may, in the interest of the public weal, project legislation against any class it reasonably finds to be the cause of that evil.<sup>75</sup> The traditional touchstone is the existence of a reasonable relation between the condition to be remedied and the subjects of the classification.<sup>76</sup>

The distinction between "alien" and "citizen" has been upheld by courts as a reasonable classification for state legislation regulating ownership of land,<sup>77</sup> the right to hold public office,<sup>78</sup> licensing of hunting and fishing,<sup>79</sup> possession of firearms,<sup>80</sup> and the privilege of operating a billiard hall.<sup>81</sup> In all these instances, however, the classification embraced *all* aliens; where a class within a class had been created,<sup>82</sup> the courts have walked warily. A California statute prohibiting aliens ineligible to become electors from fishing in certain streams was held to deny them equal protection of the laws,<sup>83</sup> and the California prohibition against ineligible alien guardianship was invalidated for the same reason.<sup>84</sup> Nor have courts been reluctant to notice the effect rather than the mere language of a statute in striking down laws based on arbitrary discriminations. A San Francisco ordinance, innocent enough on its face, requiring operators of frame-house laundries to obtain approval of the Board of Commissioners was declared a discrimination based on "race" and a denial of equal protection since its impact was felt only by Chinese laundry operators, who alone were the owners of frame establishments.<sup>85</sup> A Board of Health requirement that all male inmates of a city jail have their hair clipped, allegedly a sanitary regulation, was held unconstitutional because its designed

75. *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1914).

76. FREUND, *POLICE POWER* § 612; See 17 N.Y.U.L.Q. REV. 242, 245, 248 (1940).

77. See cases cited note 71 *supra*; 5 VERNIER, *op. cit. supra* note 18 at 304-38. GIBSON, *op. cit. supra* note 2 at 45-61.

78. Ore. Laws, 1923 ch. 121. See generally MEARS, *op. cit. supra* note 18, at 330-1. Similarly a state statute prohibiting contractors from employing aliens on public works has been upheld. *Heim v. McCall*, 239 U.S. 175 (1915). But see Powell, *The Right to Work for the State*, 16 COL. L. REV. 99 (1916).

79. *McCready v. Virginia*, 94 U.S. 391 (1876); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). See, for criticism of these two cases, KONVITZ, *op. cit. supra* note 2, at 212-8. See generally on hunting and fishing restrictions MEARS, *op. cit. supra* note 18, at 218-37.

80. *Patsone v. Pennsylvania*, 232 U.S. 138 (1914).

81. *Clarke v. Deckebach*, 274 U.S. 392 (1927). For tabular presentation of legislation restricting occupations open to aliens see KONVITZ, *op. cit. supra* note 2, at 190-211. See generally 5 VERNIER, *op. cit. supra* note 18, at 389-401; O'Connor, *Constitutional Protection of the Aliens Right to Work*, 18 N.Y.U.L.Q. REV. 483 (1941); Branse, *State Laws Barring Aliens from Professions and Occupations* 3 IMMIG. AND NAT. SOR. MO. REV., 281 (1946); 17 N.Y.U.L.Q. REV. 242 (1940).

82. Indeed it has been suggested that a class within a class within a class has been created in the case of persons subject to the disabilities of the land laws: aliens generally, aliens ineligible for citizenship, and aliens ineligible for citizenship but given the right to hold land by treaty. MEARS, *op. cit. supra* note 18 at 167.

83. *In re Ah Chong*, 2 Fed. 733 (C.C.D. Cal. 1880).

84. *Estate of Yano*, 188 Cal. 645, 206 Pac. 995 (1922).

85. *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886).

effect was to expose Chinese prisoners, shorn of their queues, to disrespect and disgrace among their countrymen;<sup>86</sup> Mr. Justice Field in vigorous language<sup>87</sup> proclaimed the duty of the Court to invalidate<sup>88</sup> attempts to shake off the inhibition of the equal protection clause.

No less unreasonable and arbitrary is the basis for classification employed by the alien land laws: *i.e.* eligibility for citizenship. The fact that the states have adopted a federal naturalization standard has weighed heavily with the courts on the theory that it is reasonable for the state to adopt a classification employed by Congress.<sup>89</sup> On further analysis, however, this rationale seems unconvincing and superficial. Assuming that the congressional classification based on "race" is reasonable for the purpose of the naturalization laws,<sup>90</sup> it does not necessarily follow that it is equally reasonable when appropriated by state legislatures for the purpose of controlling land ownership.<sup>91</sup>

A state statute declaring *Japanese* resident aliens ineligible to hold land would seem clearly violative of the equal protection clause. To permit the very same result couched in the language of the alien land laws, is to yield to verbalisms. The discriminatory nature of the classification was highlighted in 1943 when Chinese were permitted to become citizens.<sup>92</sup> By the same token, Chinese are now eligible to own land in the Pacific coast states.<sup>93</sup>

86. *Ho Ah Kow v. Nunan*, 12 Fed. Cas. 252 (C.C.D. Cal. 1879). The fear of losing his queue was calculated to provide assurance that the Chinese would pay his fine. See also *Truax v. Raich*, 239 U.S. 33 (1915) where the Supreme Court invalidated an Arizona statute making it a misdemeanor for an employer not to employ 80% or more employees who were United States citizens.

87. "Probably the bastinado, or the knout, or the thumbscrew, or the rack, would accomplish the same end; and no doubt the Chinaman would prefer either of those modes of torture to that which entails upon him disgrace among his countrymen. . . ." *Ho Ah Kow v. Nunan*, 12 Fed. Cas. 252, 255 (C.C.D. Cal. 1879) ". . . we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men . . ." *Ibid.*

88. "Against such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the nation." *Id.* at 257.

89. *Terrace v. Thompson*, 263 U.S. 197, 220 (1923); *Porterfield and Mizuno v. Webb*, 279 Fed. 114, 116 (S.D. Cal. 1921). See also Comment, 31 *YALE L. J.* 299, 304 (1922).

90. This assumption is open to serious question. See text and authorities pp. 1035-6 *infra*.

91. Congress, furthermore, since it is not subject to an "equal protection" clause, since its power over naturalization is "exclusive," and since it may deny the privilege of citizenship with or without reason, has a latitude not accorded the states. See KONVITZ, *op. cit. supra* note 2 at 165-6; see also Comment, 10 *CALIF. L. REV.* 241, 245 (1922).

92. 57 Stat. 601 (1943), 8 U.S.C.A. § 703 (Supp. 1946). In 1946 eligibility restrictions were similarly removed from Filipinos and peoples indigenous to India. 60 Stat. 416 (1946), 8 U.S.C.A. § 703 (Supp. 1946). See Carusi, *Racial Bars Removed for Filipinos and East Indians*, 4 *IMMIG. AND NAT. SER. MO. REV.* 1 (1946).

93. See Weinstok and Landels, *Right of Chinese Aliens to Take Title to Land*, 19 *CALIF. S.B.J.* 19 (1944); KONVITZ, *op. cit. supra* note 2, at 167.

Attempts to justify the reasonableness of the classification have been notably unsubstantial and non-persuasive. It was said that "it is within the realm of possibility that every foot of land within the state, might pass to the ownership or possession of a non-citizen."<sup>94</sup> Whatever validity this statement may have had when uttered, it flies in the face of reality today. Since the cessation of authorized Japanese immigration in 1924,<sup>95</sup> the American Japanese population has become preponderantly—and increasingly—native born. In 1940 there were 47,305 Japanese aliens (*i.e.*, foreign born) as compared with 79,642 born in this country,<sup>96</sup> the number of foreign born Japanese having decreased 36% since 1920,<sup>97</sup> and more than half of them were over 50 years old.<sup>98</sup> Agricultural statistics are similarly fatal to the bogey of land domination. In 1941, Japanese—alien and citizen—operated only 3.9% of the total number of farms in California, 1% in Washington, and 0.6% in Oregon.<sup>99</sup> Of the total cropland they harvested but 2.9% in California, 0.33% in Washington, and 0.3% in Oregon.<sup>100</sup> However, their crop production has been out of all proportion to their relatively small holdings; almost half of the west coast truck crops were produced on Japanese operated truck farms.<sup>101</sup> Animosity against the Japanese farmer doubtless arose in part from the fact that, through intelligence and industry, he outstripped his "white" competitors in the techniques of efficient farming.<sup>102</sup> It seems anomalous however to discourage such efficiency by means of prohibitory land legislation. Even assuming there are elements of unfair competition among the alien farm-workers, the state and the trade unions have at their disposal methods more effective

94. *Terrace v. Thompson*, 274 Fed. 841, 849 (W.D. Wash. 1921) quoted with approval by Mr. Justice Butler in *Terrace v. Thompson*, 263 U.S. 197, 220 (1923).

95. The Japanese Exclusion Act closed the doors to Japanese immigration. 43 STAT. 161 (1924), 8 U.S.C.A. § 213 c (1942).

96. This amounts to 62.7% citizen and 37.3% alien. II CHARACTERISTICS OF THE POPULATION: PART 1, 16th Census, 1940, 21. For statistical studies of Japanese-American population see STRONG, *op. cit. supra* note 63, at 152-66; ICHIHASHI, JAPANESE IN THE UNITED STATES, 94-105 (1932); PAJUS, *op. cit. supra* note 29, at 155-62 (California only).

97. II CHARACTERISTICS OF THE POPULATION: PART 1, 16th Census, 1940, 21.

98. TOLAN REPORT, 91.

99. TOLAN REPORT, 117, 131, 135. In 1940 there were 5,135 Japanese operated farms in California, 706 in Washington and 277 in Oregon. *Ibid.* Of the total in California, 70% were tenant farmers. *Ibid.*

100. *Ibid.* Certain areas, however, have much higher percentages of Japanese harvested cropland. *Ibid.* See also on Japanese-American agriculture, Poli and Engstrand, *Japanese Agriculture on the Pacific Coast*, 21 J. LAND AND PUB. UTIL. ECON. 352, 353, 356 (1945); MEARS, *op. cit. supra* note 18, at 238-61, 408-20 (tables); ICHIHASHI, *op. cit. supra* note 96, at 160-206; PAJUS, *op. cit. supra* note 29, at 145-54 (California only); MILLIS, THE JAPANESE PROBLEM IN THE UNITED STATES 103-96 (1915); Rademaker, *The Japanese in the Social Organization of the Puget Sound Region*, 40 AM. J. OF SOC. 338, 340-1 (1934).

101. Poli and Engstrand, *supra* note 100, at 357. In California it was estimated that as high as 90% of the snap beans, celery, peppers, and strawberries were grown on Japanese operated truck farms. TOLAN REPORT, 117.

102. See Powell, *supra* note 57, at 281-2; Poli and Engstrand, *supra* note 100, at 361-2.

tive, more direct, and less drastic than foreclosure of opportunity to till the soil.<sup>103</sup>

Much has been said concerning absence of loyalty to the United States on the part of the resident Japanese alien.<sup>104</sup> The experience of investigators, however, at the time of the war evacuation program, does not support this conclusion. Loyalty and allegiance were not found to follow the clean-cut lines of "alien" and "citizen."<sup>105</sup> As much disaffection was discovered among the citizen nisei as among their alien parents.<sup>106</sup> The only valid conclusion the federal authorities could reach was that each case must be investigated individually.<sup>107</sup> The key to the whole situation, it is submitted, is found not in formal analysis, but in the recurrent pattern of vague generalities about racial inferiority, unassimilability, unwillingness to accept the responsibilities of citizenship, oriental penchant for deceit, and eternal fidelity to the Emperor. The early Japanese land cases, like the whole structure of constitutional race discrimination of which they are a part, are the products of an ignorant and unconsidered attitude toward colored peoples which urgently calls for re-examination in the light of modern sociology and anthropology. The constitutional ethnology of the earlier Supreme Court is antiquated folk-lore of a primitive kind belonging with the economic shibboleths of Field and Peckham.<sup>108</sup> If American law is to be cured of the deep-seated disease of racism, the alien land laws must submit to the judicial scalpel.

A further apparent denial of equal protection, which extends to citizens as well as aliens, seems to result from the recent California and Oregon amendments<sup>109</sup> making it punishable to enter into any agreement for the purchase and sale of land if an ineligible alien is subsequently permitted to derive any benefit whatsoever from the land.<sup>110</sup> Thus if a vendor sells to a citizen-wife

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103. California has had little trouble finding ways to control and regulate her agricultural interests. CAL. STATS. 1933 c. 754, p. 1969, CAL. GEN. LAWS, Act 143a (Deering, 1944) (regulating harvesting and marketing of raisins, by restricting competition and maintaining price levels) upheld in *Parker v. Brown*, 317 U.S. 341 (1943).

104. So runs the tenor of most anti-Japanese criticism. See *THE ALIEN IN OUR MIST* (Grant and Davison ed. 1930) *passim*; CALIFORNIA STATE BOARD OF CONTROL, *op. cit. supra* note 29, at 181-91; *Report of the Joint Fact-Finding Committee on Un-American Activities in California*, SEN. DAILY JOURNAL, June 14, 1945, pp. 3856-76, Cal. Legis., 56th Sess. See discussion in McWILLIAMS, *PREJUDICE*, 121-6.

105. See statements by Attorney General Warren (Cal.) and Mayor Earl Millikin of Seattle. TOLAN REPORT, 142-3.

106. *Ibid.* See also Comment, 51 YALE L. J. 1316 (1942).

107. *Id.* at 147-51. See also Comment, 51 YALE L. J. 1316, 1337-8 (1942).

108. See Cohen, Book Review, 56 YALE L. J. 910, 912 (1946), and, generally items cited note 104 *supra*.

109. Cal. Stats. 1943, c. 1059, § 7, CAL. GEN. LAWS Act 261, § 11a, (Deering, 1944); Ore. Laws 1945, c. 436, § 1, ORE. COMP. LAWS ANN. § 61-201 (Supp. 1944-5).

110. "§ 11a. Leases, etc., in name of wife, child or other person, with allowances of beneficial use to alien: Violation of acts: Punishment: Injunction proceedings. Whenever leases, cropping agreements, or any other agreements to acquire, possess, enjoy, use, cultivate, occupy and transfer real property for farming or agricultural purposes or to transfer

or child of an ineligible alien, both vendor and vendee would be liable for criminal prosecution if the ineligible alien so much as lived on the farm or was supported by his wife or child from the agricultural earnings. Such an imposition seems not only a denial of equal protection but also an abridgment of the privileges and immunities guaranteed to all citizens.<sup>111</sup> Justifications in policy seem singularly lacking for statutes which permit a state under the guise of its "police power" to legislate against a child's supporting his father.

*Presumptions and the Due Process Clause.* Other sections of the alien land laws are vulnerable to attacks based on the unreasonableness of the statutory presumptions. Though the courts thus far have upheld them,<sup>112</sup> it is believed that upon reexamination today their constitutionality would not stand. In any action under the alien land laws, it will be recalled, proof of an "interest" in the land and of membership in an ineligible race creates a prima facie presumption of ineligibility and places the burden of proving citizenship or ineligibility on the defendant.<sup>113</sup> The statutes presume, in short, that any member of an ineligible race is an ineligible alien. Contemporary statistics indi-

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in whole or in part the beneficial use of said lands are made in the name of the wife or child of any alien mentioned in Section 2 of this act, or made in the name of any other person, and when any such alien mentioned in Section 2 of this act is then or thereafter allowed to remain or go upon the land, farm and cultivate same and enjoy directly or indirectly the beneficial use of such said agricultural lands or obtains or has a beneficial interest in or use of the proceeds received from the sale of the agricultural crops produced on said lands, then any person signing or entering into any such agreement with knowledge that any such alien shall be allowed or permitted to farm and cultivate such land and enjoy directly or indirectly the beneficial use of such agricultural lands or have a beneficial interest in or use of the proceeds received from the sale of the agricultural crops produced on said lands or any person who allows or permits any such alien to farm and cultivate such lands and enjoy directly or indirectly the beneficial use of such agricultural lands or obtain or have a beneficial interest in or use of the proceeds received from the sale of the agricultural crops produced on said lands shall be guilty of violation of the terms and provisions of this act, and upon conviction thereof shall be punished in the manner provided in Section 10a hereof, and the Attorney General or the district attorney of the proper county shall have the power to institute injunction proceedings in the name of the people of the State of California against any and all such persons for the purpose of enjoining and restraining them from carrying on farming operations on any agricultural lands in the State of California, under the terms and provisions of any such said agreements, contracts, or leases, as hereinbefore provided." CAL. GEN. LAWS Act 261, § 11a (Deering, 1944).

111. U.S. CONST. AMEND. XIV, § 1.

112. *People v. Osaki*, 209 Cal. 169, 286 Pac. 1025 (1930), 3 So. CALIF. L. REV. 423, 44 HARV. L. REV. 121. See also Comment, 17 CALIF. L. REV. 575 (1929). *But cf. Morrison v. California*, 291 U.S. 82 (1934) (denial of due process when applied in a criminal case).

113. "§9a. *Citizenship must be proved by defendant.* In any action or proceeding, civil or criminal, by the state of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part of the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant,

cate, however, that native-born Japanese outnumber aliens almost two to one,<sup>114</sup> a fact which should seemingly create a presumption the other way. To justify the presumption solely on the "balance of convenience" doctrine<sup>115</sup> is insufficient where a question of racial discrimination is involved.<sup>116</sup>

The Oregon 1945 amendments create two more presumptions seemingly equally violative of due process. In the light of the frequency with which land in one county is owned by a voter in another, allowing proof of the fact that an alien is not a registered voter of the county in which the land is located to create a *prima facie* presumption of ineligibility,<sup>117</sup> would hardly seem to

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the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant.

"§9b. *Citizenship or eligibility must be proved by defendant.* In any action or proceeding, civil or criminal, by the state of California, or the people thereof, under any of the provisions of this act when the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of any defendant, proof by the state, or the people thereof, of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by such defendant, or of any such facts, and in addition proof that such defendant is a member of a race ineligible to citizenship under the naturalization laws of the United States, shall create a *prima facie* presumption of the ineligibility to citizenship of such defendant, and the burden of proving citizenship or eligibility to citizenship as a defense to any such action or proceeding shall thereupon devolve upon such defendant.

"The legislature hereby declares that its purpose in adopting this section is not to modify, limit or affect in any manner the provisions of section 9a of this act." CAL. GEN. LAWS; Act 261, §§ 9a-b (Deering 1944).

The Oregon statute is substantially identical with § 9b of the California law, ORE. COMP. LAWS ANN. § 61-202 (Supp. 1944-5).

114. TOLAN REPORT, 91; Poli and Engstrand, *supra* note 100, at 352.

115. Such, by implication at least, has been the justification for the presumption—i.e. information to prove citizenship being presumably more accessible to the defendant than evidence to disprove it by the state. *See* *People v. Osaki* 209 Cal. 169, 192, 286 Pac. 1025, 1034 (1930), 3 So. CALIF. L. REV. 423 (1930). It is to be noted, however, that the statute applies equally to the citizen-transferor as well as to the alien-transferee. Even conceding that the fact of eligibility or citizenship may be more accessible to the alien, it is no more known to the citizen than to the state. *See* *Morrison v. California*, 291 U.S. 82, 92-3 (1934).

116. The United States Supreme Court invalidated § 9a of the California act as applied to a criminal proceeding, stating that the "convenience" test would not suffice. *Morrison v. California*, 291 U.S. 82, 94 (1934), Comment, 22 CALIF. L. REV. 420 (1934). But see Morgan, *Federal Constitutional Limitations Upon Presumptions Created by State Legislation* in HARVARD LEGAL ESSAYS 323, 346-51 (Pound ed. 1934). The Supreme Court has recently seen fit to reject the "balance of convenience" test uncoupled with a rational connection between the fact proved and the ultimate fact presumed. *Tot v. United States*, 319 U.S. 463, 467 (1943).

117. "§ 61-203—*Lack of voting registration prima facie presumption of ineligibility.* In any suit or action, civil or criminal, brought pursuant to the provisions of the laws of this state relating to the rights, powers and disabilities of aliens with respect to property, proof that the defendant is not a registered voter in the county in which the land involved in any such suit or action is located shall establish a *prima facie* presumption that such person is ineligible to citizenship." ORE. COMP. LAWS ANN. § 61-203 (Supp. 1944-5).

satisfy the test of a reasonable connection between that which is proved and that which is to be inferred. Declaring that any ineligible alien working the land shall be presumed to own a lease-hold or other interests in that land<sup>118</sup> seems equally unreasonable. The profusion of Japanese working on farms in the capacity of mere laborers vitiates completely, it is submitted, the reasonableness of this presumption.<sup>119</sup>

#### CONFLICT WITH THE "FEDERAL FIELDS"

*The Power over Immigration and Naturalization.* Power of the federal government over immigration and naturalization, commonly labelled "exclusive," is one which the states may not invade.<sup>120</sup> In the case of the alien land laws, totally apart from any conflict, each change by the federal government in racial eligibility for citizenship effects a simultaneous change in the scope of their application. Should Congress declare tomorrow that resident Japanese aliens shall be eligible for citizenship, their disabilities as to ownership of real property on the West Coast would be removed.<sup>121</sup>

It may well be suggested that state legislation so inextricably meshed with Congressional standards draws near the line of invading the "federal field." A Michigan law prohibiting "undesirable aliens," as defined by federal law, from intra-state employment was for that reason declared unconstitutional.<sup>122</sup> A Pennsylvania statute requiring compulsory registration of aliens was invalidated on similar grounds.<sup>123</sup> To what extent the federal government may retain power over resident aliens is as yet undelineated.<sup>124</sup> Where civil

118. "§ 61-204—*Presumption of ownership.* Any alien ineligible to own any interest in land in the state of Oregon who shall till, farm or work upon said land, or occupy the same in any capacity whatsoever, shall be presumed to be the owner of a leasehold or some interest in said land." ORE. COMP. LAWS ANN. § 61-204 (Supp. 1944-5).

119. There is no indication whether this presumption is to be considered conclusive or rebuttable. Certainly if it were construed as an irrebuttable presumption, the statute would appear violative of due process on its face. Probably, like the others, it is to be considered merely a *prima facie* presumption, but, so conceding, it would seem to transcend the test of reasonableness.

120. *Henderson v. City of New York*, 92 U.S. 259 (1875); the power over immigration was originally derived from the power over foreign commerce, *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875), whereas the power over naturalization stems from explicit language in Article I, § 8, cl. 4 of the Constitution. As to the exclusive nature of Congress' power over immigration see FREUND, *POLICE POWER* § 71 (1904); WASSERMAN, *THE CHALLENGE OF OUR IMMIGRATION LAWS* 15 (1945).

121. Thus, the prohibition against Chinese and Filipinos owning real property disappeared with the Nationality Acts of 1943 and 1946 respectively. See notes 92-3 *supra*.

122. *Arrowsmith v. Voorhies*, 55 F.2d 310 (E. D. Mich. 1931). *Cf.* *People v. Compagnie Générale Transatlantique*, 107 U.S. 59 (1882) (state alien passenger tax invalidated).

123. *Hines v. Davidowitz*, 312 U.S. 52 (1941). *Cf.* *Ex parte Ah Cue*, 101 Cal. 197, 35 Pac. 556 (1894) (state alien exclusion and registration act held invalid).

124. See Mr. Justice Holmes, dissenting in *Keller v. United States*, 213 U.S. 138, 149-51 (1909). See also ROTTSCHAEFER, *CONSTITUTIONAL LAW* 376 (1939).



liberties are involved, however, the Court might well extend the doctrine to discriminatory land legislation, which precludes resident Japanese aliens from so much as working or living on a farm. Such a prohibition, by denying Japanese farmers opportunity to earn their living, is, in effect, to exclude them from the state.<sup>125</sup> This no state can do, once the federal government has admitted them to the country.

*Conflict With the Treaty Power.* Equally explicit in the terms of the land laws is the inapplicability of all prohibitions where an existing treaty declares otherwise.<sup>126</sup> Even though such deference were not set out, the state statute would yield to provisions of the treaty.<sup>127</sup> Under the guaranties of the treaty of 1911,<sup>128</sup> for example, state legislation subjecting Japanese aliens to certain disabilities has been invalidated by the courts.<sup>129</sup> Moreover, terms of a treaty, once incorporated into municipal legislation, are said to endure even though the treaty itself has been abrogated.<sup>130</sup>

Though technically less controlling, congressional-executive or presidential agreements, in the light of historical analysis, have been accorded effect equal to that of treaties as the "supreme law of the land."<sup>131</sup> It is not inconceivable that the President may make an agreement with the mother country permit-

125. To prevent the ineligible alien from engaging in agriculture in any way, shape, or fashion, which the recent California amendments seek to do, would seem a denial of entrance indistinguishable from that achieved by a flat prohibition against working as an employee. *See* *Truax v. Raich*, 239 U.S. 33, 42 (1915); *Ex parte Mohriez*, 54 F. Supp. 941, 943 (D. Mass. 1944). *See also* KONVITZ, *op. cit. supra* note 2, at 169.

126. CAL. GEN. LAWS, Act 261, § 2 (Deering 1944); ORE. COMP. LAWS ANN. § 61-102 (1940); WASH. REV. STAT. § 10581 (b) (Remington, 1933).

127. "It is the declared will of the people of United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; . . ." *Ware v. Hylton*, 3 Dall. 199, 237 (U.S. 1794); *accord: Chirac v. Chirac*, 2 Wheat. 259 (U.S. 1817); *Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Geofroy v. Riggs*, 133 U.S. 258 (1890); *Missouri v. Holland*, 252 U.S. 416 (1920); *Asakura v. Seattle*, 265 U.S. 332 (1924).

128. Treaty of Commerce and Navigation Between the United States and Japan, 37 STAT. 1504 (1911). Though guaranteeing nationals of the contracting parties the right to "carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, . . . to lease land for residential and commercial purposes, . . ." the treaty did not provide for the reciprocal right to own agricultural land. *Ibid.*, Art. I; *Terrace v. Thompson*, 263 U.S. 197, 222 (1923).

129. *Asakura v. Seattle*, 265 U.S. 332 (1924) (right to run a barber-shop); *In re Naka's License*, 9 Alaska 1 (D. Alaska 1934) (right to purchase liquor license).

130. In *Palermo v. Stockton Theatres*, 76 Adv. Cal. App. 26, 172 P.2d 103 (1946), the court held that, even though the war with Japan had abrogated the treaty, the provisions of the treaty permitting leasing of non-agricultural land to ineligible aliens had become a part of the local law. *See also* *Magnani v. Hartnett*, 257 App. Div. 487, 14 N.Y.S. 2d 107 (1939) *aff'd* 282 N.Y. 619, 25 N.E.2d 395 (1940) (provisions of the Jay Treaty of 1790 still in force).

131. *See* *United States v. Belmont*, 301 U.S. 324, 331-2 (1937) (presidential compact to be given equal effect to a treaty with respect to conflicting state law); *United States v. Pink*, 315 U.S. 203, 229-30 (1942) (presidential agreement with Russia took precedence

ting reciprocal ownership of land. Such an agreement would override any alien land laws then existing.

The status of the alien under pre-UN international law was only that guaranteed by the amorphous "minimum standards,"<sup>132</sup> which conventionally were said not to include the right to acquire real property.<sup>133</sup> But this situation no longer obtains. By the United Nations Charter, signatory nations have resolved to combine their efforts to promote social progress and better standards of life, to practice tolerance, and to live together in peace.<sup>134</sup> Article 55c, more specifically, requires the fostering of:

"universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."<sup>135</sup>

Article 56 continues with the following implementing provision:

"All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."<sup>136</sup>

With declaration of policy in language so unambiguous it is at least probable that this document—having the force of a treaty—may be incorporated into the body of American municipal law.<sup>137</sup> "Joint and separate action" consistent with these purposes would certainly demand invalidation or repeal of the alien land laws. Whether the provisions of Articles 55 and 56 are limited by Article 2(7), prohibiting intervention in matters essentially "within the domestic jurisdiction of any state," is subject to controversy. There is at least scholarly authority, however, for the proposition that they are not.<sup>138</sup>

over New York state law). See generally McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 and 534 (1945); see also Jessup, *The Litvinoff Assignment and the Belmont Case*, 31 AM. J. INT. L. 481 (1937).

132. GIBSON, *op. cit. supra* note 2 at 61, 154. See, generally, Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 MICH. L. REV. 445 (1940).

133. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 512 (1938). Authorities cited *Id.* at 513 n. 1.

134. CHARTER OF THE UNITED NATIONS, Preamble (1945). See also Final Act, Inter-American Conference on Problems of War and Peace, Resol. xli, Reprinted in Report of the U.S. Delegation (recommending that the American Republics "... make every effort to prevent ... all acts which may provoke discrimination among individuals because of race or religion.")

135. CHARTER OF THE UNITED NATIONS, Art. 55(c) (1945). See also *Id.*, Art. 1(3).

136. *Id.*, Art. 56.

137. Such a probability is not without judicial precedent. In *Re Drummond Wren*, [1945] O.R. 778, a Canadian court held a restrictive covenant against Jews void as against public policy, relying in part on the declarations of the Charter to which Canada was a signatory. *Id.* at 781.

138. See Kelsen, *Limitations on the Functions of the United Nations*, 55 YALE L. J. 997, 1006-7, 1007 n. 10 (1946). See also Foreword by Douglas, *id.* at 868.

## CONCLUSION

Time and circumstance have rendered non-existent whatever realities may have originally justified the alien land laws. Fancied fears of a fecund "yellow horde," inordinate anxiety over alien ownership of all farm land, and chimney-corner whisperings of generic disaffection for the American scheme have little basis in fact today. At bottom, the land laws are products of a prejudice abundantly manifest.<sup>139</sup> Preservation of these discriminatory statutes, furthermore, has dangerous overtones: the resident alien is their butt today; the Japanese-American citizen may well be their scapegoat tomorrow. "It is generally impossible to localize the infection."<sup>140</sup> To hope that the west coast states themselves will undergo a change of front seems mildly quixotic. National action by either courts or Congress will soon be sought.<sup>141</sup> Appearances indicate that court action will come first.<sup>142</sup>

Court determination, however, should neither preclude nor delay congressional activity. The time is auspicious to reassess and reformulate our entire immigration and naturalization policy.<sup>143</sup> The phrase "free white," adopted in 1790 for the specific purpose of excluding slaves,<sup>144</sup> still controls our naturalization standards. The courts have compounded confusion by holding that "white race" is not to be determined by scientific or ethnic criteria, but by the inconclusive test of "common understanding."<sup>145</sup> A District judge in

139. "It is expected that ultimately there won't be a parcel of Jap-owned real estate in Los Angeles," Los Angeles Times, Dec. 5, 1943, quoted in McWILLIAMS, PREJUDICE, 139. In 1944 an attempt was made to submit to popular initiative in California a law prohibiting Japanese aliens from owning any type of property whatsoever, but the provision failed to get sufficient signatures. New York Times, Sept. 10, 1944, p. 22, col. 1. See generally Sugihara, *I Don't Want to Go Back*, 42 COMMONWEAL 330 (1945) and McWILLIAMS, PREJUDICE, *passim*.

140. Oppenheimer, *The Constitutional Rights of Aliens*, 1 BILL OF RIGHTS REV. 100 (1941).

141. See Sugihara *supra* note 139 at 330. For a discussion of various proposals concerning Federal control of race relations see Collier and Padover, *An Institute of Ethnic Democracy*, COMMON GROUND Autumn, 1943 p. 3; Biddle, *et al.*, *Are Race Relations the Business of the Federal Government*, *Id.* Winter, 1944, p. 3; and Shepard, *The Tools for Ethnic Democracy*, *Id.* Spring, 1944, p. 3.

142. Certiorari has been granted in the *Oyama* case discussed *supra* pp. 1018-9. See note 14 *supra*.

143. See generally, *The Recent Congressional Hearings on Immigration and Naturalization Problems*, 3 IMMIG. AND NAT. SER. MO. REV. 249 (1946).

144. 1 STAT. 103 (1790). See *In re Rodriguez*, 81 Fed. 337, 349 (W.D. Tex. 1897); KOHLER, IMMIGRATION AND ALIENS IN THE UNITED STATES 392-8 (1936); McWILLIAMS, PREJUDICE 48-9. The term "free white" was omitted from the revised statute of 1875 but restored immediately thereafter by the Act to Correct Errors and Supply Omissions. KOHLER, *supra* at 394; Wigmore, *American Naturalization and the Japanese*, 28 AM. L. REV. 818 (1894).

145. *United States v. Bhagat Singh Thind*, 261 U.S. 204, 209-10, 214-5 (1923) ("free white person" means "caucasian" only as word is popularly used); *Ex parte Mohriez*, 54 F. Supp. 941 (D. Mass. 1944). The first Supreme Court declaration of ineligibility of Japanese was in *Ozawa v. United States*, 260 U.S. 178 (1922). The courts have found

California once said that "white" meant "Caucasian"<sup>146</sup> and this was later embalmed in precedent by Mr. Justice Sutherland.<sup>147</sup> It seems highly desirable in the interests of rational government and international comity to abandon completely such fugitive standards.<sup>148</sup>

It is to be hoped that the Supreme Court, in reconsidering the Pacific Coast alien land legislation, will not limit itself to striking down scattered sections of the laws,<sup>149</sup> but will invalidate the whole scheme on broad grounds. Within the last decade the Court has felt constrained to scrutinize all racial laws with care and to indicate that classification based on race alone is per se a denial of equal protection.<sup>150</sup> *Terrace v. Thompson* should prove no stumbling block, for changing conditions can invalidate legislation once held valid.<sup>151</sup> The Chinese may own land as of 1943; the Filipinos and East Indians since 1946; the resident Japanese alien alone is the object of the discrimination. No matter how colorable the alleged intent—framed in the language of control over "property"—the alien land laws are legislation of racism<sup>152</sup> which the court can little afford to sanction.

themselves in inextricable confusion when forced to determine eligibility of aliens of the half blood. See *In re Knight*, 171 Fed. 299 (E.D.N.Y. 1909) (Father, English; mother, half Japanese and half Chinese—ineligible); *In re Cruz*, 23 F. Supp. 774 (E.D.N.Y. 1938) ("African descent" means an "affirmative quantity" of African blood); see generally McGovney, *Naturalization of the Mixed-Blood—A Dictum*, 22 CALIF. L. REV. 377 (1934); KOHLER, *op. cit. supra* note 144 at 399-405.

146. Judge Sawyer in *In re Ah Yup*, 1 Fed. Cas. 223, No. 104 (C.C.D. Cal. 1878).

147. *Ozawa v. United States*, 260 U.S. 178, 197 (1922); *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214-5 (1923).

148. See *Ex parte Mohriez*, 54 F. Supp. 941, 943 (D. Mass. 1944); *In re Mudarri*, 176 Fed. 465, 467 (C.C.D. Mass. 1910); McWILLIAMS, PREJUDICE 290-1.

149. Certainly the recent sections added to the California and Oregon laws (notes 110, 113 *supra*) would seem invalid. Similarly, the Court could find that the effect of the laws as applied to *citizens*, as in the *Oyama* case *supra*, may be a denial of privileges and immunities. See Petition for Writ of Certiorari, pp. 8-17, *Oyama v. California*, 15 U.S.L. WEEK 3376 (April 7, 1947). To invalidate only the most offensive sections, however, would leave the essential structure of the legislation still intact.

150. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."); *Smith v. Texas*, 311 U.S. 128, 130 (1940).

151. See *Nashville, C. & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 (1935); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1924); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921).

152. See Mr. Justice Murphy, dissenting in *Korematsu v. United States*, 323 U.S. 214, 242 (1944).